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Supreme Court, U.S.
FILED
JAN 13 2004
OFFICE OF THE CLERK

No. 03-674

IN THE

Supreme Court of the United States

KEYSE G. JAMA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY MEMORANDUM

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INTRODUCTION

"For nearly a half-century, the courts have held the United States cannot deport an alien unless the receiving country advises us it is willing to accept the alien." Pet. App. 9a (Bye, J., dissenting) (collecting cases). The Eighth Circuit's decision stands alone in holding that 8 U.S.C. § 1231(b) authorizes the government to deport a person from the United States without first establishing that the country in question would accept his or her return. Respondent has failed to identify any valid reason why the Supreme Court should not review this issue of national importance.

I. THE EIGHTH CIRCUIT SPLIT FROM THE SETTLED AUTHORITY ON AN ISSUE OF NATIONAL IMPORTANCE.

In its brief opposing certiorari, the government is unable to refute the fact that the Eighth Circuit's opinion creates a split of authority in an area of national importance and fundamental human rights. Indeed, the Eighth Circuit itself explicitly acknowledged its creation of this split: "[Petitioner] cites *United States ex rel. Tom Man v. Murff*, 264 F.2d 926, 928 (2d Cir. 1959), and its unquestioning progeny for the proposition that the acceptance requirement of clause (vii) applies to clauses (i) through (vi). We are not bound by these decisions; indeed, we are not persuaded by them . . .."[1] Pet. App. 6a. The Ninth Circuit, as well,

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[1] The Eighth Circuit did not distinguish *Tom Man* as having interpreted a different, earlier statute. Rather, the Eighth Circuit simply disagreed with, and split from, the Second Circuit's ruling in *Tom Man*. Pet. App. 6a. Indeed, there is no basis to distinguish between the two statutes. The District Court of Minnesota "carefully reviewed both statutes but [found] no meaningful distinction between the two statutes" and the government conceded that the statutes contain "the

recognized this fundamental split of authority in its *Ali v. Ashcroft* decision:

> Requiring acceptance before removal is consistent with all of the case law that has touched on the question. The one exception is the Eighth Circuit's decision in *Jama* . . .. We thus disagree not only with the conclusion of the majority opinion in *Jama* but also with its statement that there is "no settled judicial construction of the provision in question."

Ali v. Ashcroft, 346 F.3d 873, 882 (9th Cir. 2003). Furthermore, Respondent admits that a clear split exists between the Eighth and Ninth Circuits. Brief in Opp. at 9. The result of the opposing interpretations dividing the circuits will be sharply different treatment of identically situated persons based solely on the location in which they are detained.

Unable to refute this compelling basis for the granting of certiorari, the government instead "suggests" that this issue of national importance "might be better considered" in the context of the *Ali* case. Brief in Opp. at 17. However, the government's argument contains no compelling reason to deny certiorari in this case. To the contrary, the government's suggestion in fact *concedes* that the issue in question, whether the Attorney General can remove an alien to one of the countries designated in 8 U.S.C. § 1231(b)(2)(E) without obtaining that country's acceptance of the alien prior to removal, is one meriting the Supreme Court's attention. *Id.* at 16. The fact that *Ali* is a class action suit is irrelevant. If the Supreme Court decides the issue of

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same or similar language." *Jama v. INS*, 2002 WL 507046, *6 (D. Minn. Mar. 31, 2002) (Tunheim, J.), Pet. App. at 52a.

statutory construction in this case, the ruling will have national application regardless of the fact that the present case is not a class action.[2]

The present petition should not be denied in favor of reviewing the identical statutory question in *Ali* for a more fundamental reason. If certiorari is denied in this case, the Petitioner is subject to immediate removal to Somalia. Assuming the Supreme Court ever reaches the question in the context of the *Ali* case, if the Supreme Court concludes that removal is improper absent acceptance from the receiving country, then Petitioner will have suffered irreparable, perhaps fatal, harm.[3] Justice should not be denied today in

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[2] That *Ali* also involves issues of class certification and identification of the proper respondent does not weigh in favor of denying certiorari here. The government is unable to refute that the issue of statutory construction alone is of sufficient significance to merit certiorari. Should additional issues present in *Ali* merit consideration, the Supreme Court may consolidate that case with the present matter.

[3] The government attempts to minimize the human rights concerns of the present matter, asserting that there is "no force" to Petitioner's statement that this matter is of national importance. Brief in Opp. at 14-15. It should be noted, however, that Somalia is included in the small group of countries for which Temporary Protected Status is available. *See* INA § 244(b), 8 U.S.C. § 1254a (2002); 8 C.F.R. § 244. That status extends to eligible aliens who cannot return to their countries of birth due to armed conflict, natural disaster, or other extraordinary circumstances. The government notes that Petitioner was not granted asylum under this statute. However, Petitioner's asylum application only addressed the issue of an *individualized* fear of persecution and not the general danger return to Somalia entails. Regardless of the reasons that Petitioner was not granted asylum, there is no

favor of the possibility of justice tomorrow, particularly where tomorrow will be too late for Petitioner.

II. A "PLAIN READING" OF THE STATUTE CANNOT SUPPORT THE EIGHTH CIRCUIT'S RULING.

The government also argues that review is unwarranted because the Eighth Circuit's decision is supported by a "plain reading" of the statute.[4] This argument fails. First, it is nonsensical to argue that the "plain meaning" conclusively supports an interpretation contrary to the reading courts unanimously have been applying for *fifty years*.

In 1959, Judge Learned Hand of the Second Circuit explicitly recognized that the removal statute required acceptance in all of the statute's subdivisions:

> There remains therefore one or more of the seven subdivisions of 243(a) of which number three [the country in which he was born] certainly covers him and probably several others. *However, we think that deportation under any of these is subject to the condition expressed in the seventh subdivision: i.e. that the "country" shall be "willing to accept" him "into his territory."*

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question that removing persons such as Petitioner to Somalia "would subject them to human rights abuses in violation of customary international law and provisions of three multilateral treaties to which the United States is a signatory." *Ali*, 346 F.3d at 885 (quotation omitted).

[4] The Petitioner set forth his arguments on the proper reading of the statute in his Petition and will not repeat them here.

United States ex rel. Tom Man v. Murff, 264 F.2d 926, 928 (2d Cir. 1959) (emphasis added). Until the Eighth Circuit's decision, the federal courts uniformly recognized and followed this authority. *See, e.g., Chi Sheng Liu v. Holton*, 297 F.2d 740, 744 (9th Cir. 1961) (expressly adopting *Tom Man*'s interpretation in holding that statute requires INS to seek and obtain the consent of a foreign country prior to repatriation); *Rogers v. Lu*, 262 F.2d 471, 471 (D.C. Cir. 1958) (pre-dating *Tom Man* and affirming judgment that Attorney General "may not deport the plaintiff . . . to the mainland of China until and unless the Chinese People's Republic has advised the defendant that it is willing to accept the plaintiff into the mainland of China").[5]

The government attempts to distinguish the present matter from the previous case law on the grounds that Somalia has no acting central government and thus the acceptance requirement cannot apply. The statute contains no such distinction. Judge Tunheim concluded that "[t]he silence of a non-functioning government in a lawless territory—with grave risks to the deported alien—simply cannot constitute "acceptance under § 1231(b)(2)." Pet. App. 54a.

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[5] Respondent attempts to distinguish Petitioner's case law on this point by suggesting that the cases other than *Tom Man* and *Ali* offer summary holdings or are dicta. Brief in Opp. at 11. To the contrary, these cases illustrate the settled nature of the interpretation in *Tom Man*. Furthermore, Respondent is completely unable to distinguish *Tom Man*, as it is directly on point and conclusively holds that acceptance is required from the "additional removal countries" set forth in step three of the removal statute. Therefore, even under the government's assertion, there remains a clear and definite split between the Eighth and the Second (as well as Ninth) Circuits.

Furthermore, on February 20, 2003 the Office of Legal Counsel of the Department of Justice rendered an Opinion which admits that acceptance is required pursuant to each subsection of the statute:

> If the country of the alien's citizenship or nationality declines to accept the alien, the Attorney General is instructed to attempt to remove the alien to one of six listed countries, including the country in which the alien was born and the country from which the alien was admitted to the United States. *See* INA § 241(b)(2)(E)(i)-(vi). *Each of those countries, of course, would have to be separately negotiated with by the United States, and would also have to be given an appropriate amount of time -- presumably 30 days -- to decide whether to accept or reject the alien.* Finally, ***if none of the six listed countries is willing to accept the alien***, or if the Attorney General decides that it would be "inadvisable" to send the alien to any of the listed countries that is willing to accept him, the Attorney General is instructed to remove the alien to any country of the Attorney General's choice whose government is willing to accept the alien. *See* INA § 241(b)(2)(E)(vii).

See Memorandum Opinion for the Deputy Attorney General: Limitations on the Detention Authority of the Immigration and Naturalization Service, n.11 (OLC Feb. 20, 2003) (emphasis added), available at http://www.usdoj.gov/olc/INSDetention.htm. When offering an objective summary of the law, the Justice Department's Office of Legal Counsel set forth the established construction of the statue which directly contradicts the interpretation that department has

adopted for the purpose of litigation.[6] The government's admission that the statute requires acceptance completely forecloses its argument here that a "plain reading" of the statute evinces no such requirement.

The government also attempts to argue that prior administrative decisions support the Eighth Circuit's opinion. The government's reliance on *In re Niesel*, 10 I. & N. Dec. 57 (BIA 1962), is misplaced. "*Niesel* simply held that the government appropriately disregarded a petitioner's designation and lawfully chose another country without *first inquiring* whether that country would accept the petitioner. Thus, *Matter of Niesel* addressed only the issue of an *initial* inquiry, not final acceptance of the country to which a person would be returned." Pet. App. 10a (Bye, J., dissenting) (quoting *Ali v. Ashcroft*, 213 F.R.D. 390, 403 (W.D. Wash. 2003)).

Respondent attempts to blunt the force of *In re Linnas*, 19 I. & N. Dec. 302 (BIA 1985) by arguing that, because the case arose in Second Circuit, the BIA was compelled to follow *Tom Man*. However, *Linnas* contains no indication that the BIA felt constrained to merely follow *Tom Man* and did not concur on the merits. That *Linnas* fails to mention *Niesel* demonstrates that *Niesel* is not on point. The BIA did not accept one rule for the Second Circuit and another for the rest

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[6] The government failed to disclose this Opinion to the Eighth Circuit, even though the case was pending before the Eighth Circuit for another three months after the OLC published the Opinion. Thus, the Eighth Circuit did not benefit from consideration of the OLC's affirmation of the courts' long standing interpretation of the statute when it ruled in this case. Respondent cites the paper now because it recently received a letter from counsel demanding an explanation for the divergent internal positions.

of the country.

In short, the government's argument that a "plain reading" of the statute supports the Eighth Circuit's ruling is simply untenable in the face of fifty years of contrary judicial authority and the government's own written admissions.

Second, a statutory interpretation of ask first but proceed if "acceptance is not forthcoming" requires a torturous reading that is far from "plain." Brief in Opp. at 13. The statute provides that immigration officials may disregard an alien's own country designation, but then must attempt removal to a country of which the alien is a subject national or citizen. 8 U.S.C. § 1231(b)(2)(D). The statute does not provide in step three, entitled "Additional Countries," that if acceptance is not forthcoming (e.g. the target country determines the deportee in fact is not its subject, national or citizen), that immigration officials may simply remove the person in the absence of acceptance or in the face of rejection. 8 U.S.C. § 1231(b)(2)(E). Rather, the legislative history of the statute is clear that Congress sought to provide immigration officials additional options of countries with a nexus to the deportee who might agree to accept the alien. Pet. at 15-16 (discussing legislative history).

Respondent further argues that Congress could not have intended that foreign governments could prevent the United States from sending deportees to that country without its acceptance. Brief in Opp. at 13. In fact, thousand of aliens with final removal orders remain in detention or under orders of supervision because the U.S. government does not recognize a certain government or because a government has failed to respond to requests for acceptance or refused to accept the alien. Donald M. Kerwin, *Throwing Away the Key: Lifers in INS Custody*, 75 No. 18 Interpreter Releases 649, 650 (May 11, 1998). These aliens wait indefinitely, sometimes 10-15 years, for the conditions to become right for

their removal.

Finally, Respondent contends that the United States will not attempt to remove an alien to a country whose government is unwilling to receive the alien. Brief in Opp. at 14. However, citing the Eighth Circuit's holding in this case, the government in at least one case has done exactly that—removed a person to a country which explicitly refused to issue travel documents or grant acceptance. *See Abdulrahman v. Heston*, No H-02-0743, at 5 (S.D. Tex., June 9, 2003). Clearly, the issue is one that merits the Supreme Court's attention.

CONCLUSION

Respondent's Brief in Opposition fails to counter Petitioner's demonstration that a deep split in the circuits on an important question of national interest exists. The petition for a writ of certiorari should be granted so that the Supreme Court may resolve the opposing statutory interpretations.

Respectfully submitted,

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January 13, 2004